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In the Supreme Court of the United States

OCTOBER TERM, 1976

SHELL OIL COMPANY, PETITIONER

v.

ANNE M. DARTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in support of the petition for a writ of certiorari. Although the United States believes that the court of appeals' decision in this case is correct, that decision conflicts with decisions of other courts of appeals on an issue of substantial importance arising under the Age Discrimination in Employment Act of 1967. If the petition is granted, the United States will submit a brief as amicus curiae urging affirmance of the decision below.

INTEREST OF THE UNITED STATES

The United States has an immediate interest in this case because of the responsibilities of the Secretary of Labor under the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. 621 *et seq.* ("ADEA" or "Act"). The purposes of the ADEA are to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. 621(b). To effectuate these purposes, Congress conferred upon the Secretary of Labor a variety of responsibilities. These include responsibility for investigating charges of age discrimination in employment and attempting to eliminate "through informal methods of conciliation, conference, and persuasion" any practices that appear to violate the Act. 29 U.S.C. 626 (a) and (b). In the event the Secretary fails to achieve voluntary compliance with the Act's provisions, he is empowered to bring suit in federal district court for such legal or equitable relief as may be appropriate. 29 U.S.C. 626(b).

Congress also provided in the ADEA, as an alternative to suit by the Secretary, for private actions by "any person aggrieved" by age discrimination in employment. 29 U.S.C. 626(c). But before a private enforcement action may be brought, the Act requires the person alleging age discrimination to provide the Secretary with at least 60 days' notice of intent to file

suit. 29 U.S.C. 626(d). In cases such as the present, involving an alleged incident of age discrimination in a state without a law prohibiting such discrimination (see 29 U.S.C. (Supp. V) 633(b)), the Act also requires that notice of intent to institute a private enforcement action "shall be filed * * * within [180] days after the alleged unlawful practice occurred." 29 U.S.C. 626(d)(1).

If the ADEA is construed to bar courts from entertaining private enforcement actions whenever the person alleging age discrimination has failed to file a notice of intent to sue within 180 days of the asserted violation, the private enforcement provisions of the Act will be substantially weakened. Indeed, judicial decisions—contrary to the decision below—construing the notice provision of the ADEA as a jurisdictional prerequisite to private enforcement actions already have frustrated achievement of the purposes of the ADEA in a significant number of cases. Given the Secretary's responsibilities under the ADEA, and the limited resources available for public enforcement actions (see 29 U.S.C. (Supp. V) 634), the United States has a significant interest in resolution by this Court of the present conflict on the question presented in this case.

STATEMENT

Most of the relevant facts, proceedings below and statutory provisions are set forth in the petition and other papers already filed with this Court. We add only the following observations.

1. Almost immediately following her discharge by petitioner Shell Oil Company, respondent—believing that she had been discharged unlawfully because of her age—consulted an attorney. The attorney informed respondent that she did not need to retain counsel to challenge her discharge, but rather should communicate with the United States Department of Labor. On August 9, 1973, nine days after her discharge, respondent visited the Tulsa, Oklahoma, office of the Wage and Hour Division of the Department of Labor and spoke with Assistant Area Director J. Dean Speer (see Pet. 4).

Speer questioned respondent "about the facts of the case, * * * made notes [and] fill[ed] out [a Labor Department] internal form indicating the substance of her complaint" (Tr. 116).[1] In addition, Speer told respondent that "on the face of it, it appears that you do have a right to complain and I'll investigate and I will let you know" (Tr. 33–34). Because of what Speer considered to be a good working relationship with the Shell Oil Company (Tr. 110–112, 116–119), he immediately undertook to conciliate the matter (Tr. 92–93). Speer called Shell "that very afternoon" (Tr. 112) and informed one of its representatives—Frank Thompson—that respondent had filed a complaint charging age discrimination (Tr. 57). The next day, August 10, Thompson relayed the substance of Speer's telephone call to Kenneth E.

[1] "Tr." refers to the transcript of the hearing in the district court on petitioner's motion to dismiss the present suit for failure to state a cause of action.

Jacobs, Shell's Manager for Employee Relations, whose duties include monitoring compliance with the ADEA (Tr. 53–57).

Approximately one week later, Speer called Jacobs directly and arranged a conference to discuss respondent's complaint (Tr. 58, 126). But all efforts to conciliate respondent's grievance, which began with a conference on or about August 18, 1973, and continued for several months thereafter, were ultimately unsuccessful (see Pet. 4–5).

While conciliation efforts were underway, respondent called Speer on numerous occasions to inquire about the status of her complaint. In each instance, respondent was informed that she would be notified as soon as formal action had been taken but was not told of her right to bring suit under the ADEA or of the requirement that she file notice of her intent to sue within 180 days of the alleged act of discrimination (Tr. 28–29, 34–35, 46–47). Finally, on March 5, 1974, Speer wrote to respondent and informed her that there would be some further delay in completing the investigation. Speer also sent to respondent on March 5 a Labor Department pamphlet which explained the procedures for pursuing complaints under the ADEA (see Pet. 5).

Respondent first learned of the 180-day notice-to-sue provision of the ADEA when she received the materials that Speer had sent to her on March 5, 1974. Upon receiving those materials, she immediately retained an attorney who, on March 14, 1974—216 days after respondent's discharge—filed notice of re-

spondent's intention to sue (see Pet. 5–6). On May 21, 1974, respondent filed the present action in the United States District Court for the Northern District of Oklahoma (Pet. App. 18a).

2. On February 6, 1975, the district court entered an order dismissing the present action on the ground that respondent had not complied with Section 7(d)(1) of the ADEA, 29 U.S.C. 626(d)(1), which requires that notice of intent to institute a private enforcement action "be filed * * * within [180] days after the alleged unlawful practice occurred." The court held that the notice-to-sue provision contained in Section 7(d)(1) of the ADEA is a jurisdictional prerequisite to the maintenance of private enforcement actions and that it must be strictly construed without regard to the equities of the particular case (Pet. App. 1a–15a).

The court of appeals reversed (Pet. App. 16a–26a). It noted that "ample authority" supported the district court's conclusion that compliance with Section 7(d)(1) of the ADEA is a jurisdictional prerequisite to private actions seeking relief from age discrimination (*id.* at 19a). But after having reviewed that authority, and assessing the purposes and legislative history of the ADEA, the court of appeals concluded that "while * * * [the] notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel" (*id.* at 23a). The court also held that the circumstances surrounding the filing of respondent's

complaint warranted an equitable tolling of the 180-day notice-to-sue provision and consideration of the complaint on its merits (*id.* at 26a):

> We cannot fault [respondent] in her efforts to present her cause. She twice promptly sought legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause. This is not a case of a plainitff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of [respondent's] notice of intent to sue.

DISCUSSION

This case presents to this Court for the first time the question whether the 180-day notice-to-sue provision of the ADEA is subject to equitable tolling, or whether it must strictly be complied with as a jurisdictional prerequisite to private enforcement actions. That question has been the subject of considerable litigation in the lower courts and is of substantial and continuing importance. The holding in this case is in direct conflict wth the holdings of two other courts of appeals, and of several district courts. While we believe that the decision in this case is correct, we believe that the issue presented is of sufficient importance to warrant review by this Court.

1. As the courts uniformly have recognized, Congress patterned the ADEA in substantial measure after Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq. E.g., Laugesen* v. *Anaconda Co.*, 510 F. 2d 307, 311 (C.A. 6); *Goger* v. *H. K. Porter Co., Inc.*, 492 F. 2d 13, 15 (C.A. 3). Thus, for example, the 180-day notice-to-sue provision contained in Section 7(d)(1) of the ADEA is similar to the provision of Title VII requiring that "[a] charge * * * be filed [with the Equal Employment Opportunity Commission] within [180] days after the alleged unlawful employment practice occurred." 42 U.S.C. (Supp. V) 2000e–5(e). But as the court of appeals pointed out (Pet. App. 20a), there is substantial precedent for allowing equitable considerations to toll the 180-day charging requirement of Title VII. *E.g., Laffey* v. *Northwest Airlines*, C.A.D.C., Nos. 74–1791 and 75–1334 (decided October 20, 1976); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924, 926–929 (C.A. 5); *Sanchez* v. *Trans World Airlines, Inc.*, 499 F. 2d 1107, 1108 (C.A. 10); contra, *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1314–1316 (C.A. 8).

We submit that the court of appeals was no less justified in the present case in assessing the circumstances surrounding the filing of respondent's complaint and in deciding whether equitable tolling of the 180-day notice-to-sue requirement was appropriate. The ADEA, like Title VII, "is an intricate statute hedged about with definitional, substantive, and procedural limitations, restrictions, and requirements"

(*Equal Employment Opportunity Commission* v. *Wah Chang Albany Corp.*, 499 F. 2d 187, 189 (C.A. 9)). But as this Court has noted in discussing the procedures prescribed under Title VII, insistence upon procedural "technicalities [is] particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. 522, 527).[2] Under both Title VII and the ADEA (*Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F. 2d 199, 202–203 (C.A. 3), vacated on other grounds, 424 U.S. 737)—

> the charge of discrimination must be initiated by laymen—people who are apt to be of varying educational backgrounds and certainly few, if any, having knowledge of the subtleties of pleading and of statutory distinctions. * * * [Consequently,] we believe that to deny them access to the federal courts because of a technical error would seriously undermine the policies of the Act and serve only to harm the interests of those whom the Act was designed to protect.

The legislative history of the ADEA indicates that Congress did not intend the notice-to-sue provision to operate as an inflexible time limitation on the maintenance of private enforcement actions. In enacting the

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[2] Despite the express requirement of 42 U.S.C. (Supp. V) 2000e–5(d) that a complaint under Title VII must have been filed by the person aggrieved within 210 days after the alleged unlawful practice occurred or within 30 days after the appropriate state agency has terminated its proceedings, this Court approved in *Love* v. *Pullman Co.*, *supra*, a different practice which equally served the statutory purposes without prejudicing the defendant. Cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798.

ADEA, Congress accepted the Administration's proposal that complaints of age discrimination in employment—like claims of discrimination covered by Title VII—be dealt with initially by efforts directed toward conciliation. But it rejected the Administration's further proposal to incorporate into the ADEA the post-conciliation enforcement procedures contained in Title VII. See 113 Cong. Rec. 2794–2796 (1967). Specifically, Congress was concerned that the delays which have plagued the implementation of Title VII not occur under the ADEA, and it therefore incorporated into the ADEA many of the enforcement procedures of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*—which involve somewhat greater emphasis on relief via the courts than is contemplated by Title VII. *E.g.*, 113 Cong. Rec. 7076 (1967) (remarks of Sen. Javits).

Thus, the ADEA, as finally enacted, gave persons alleging age discrimination in employment a right of access to the courts after the expiration of an initial 60-day period during which the Secretary of Labor would attempt to conciliate their claims. 29 U.S.C. 626(d). As the court of appeals pointed out, the basic functions of the 180-day notice requirement in the statutory scheme are "(1) [t]o provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh, and (2) to give early notice to the employer of a possible lawsuit, the latter promoting both the preservation of evidence and good faith negotiating on the part of the employer during the conciliation

period" (Pet. App. 24a–25a). The court of appeals was amply justified in concluding that both of these goals had been satisfied in the present case, despite respondent's failure to file with the Secretary until 216 days after her discharge a notice of her intention to file suit. Cf. *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526.

2. Despite our belief that the decision in this case is correct, we support the petition for a writ of certiorari because of the importance of the issue presented and because of the conflict on the issue in the courts of appeals. The holding in this case that the notice-to-sue provision of the ADEA is jurisdictional only in the sense that such notice must be filed before a private enforcement action can be maintained is in direct conflict with holdings of the Fifth and Sixth Circuits. *Eklund* v. *Lubrizol Corp.*, 529 F. 2d 247 (C.A. 6); *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367 (C.A. 6); *Hiscott* v. *General Electric Co.*, 521 F. 2d 632 (C.A. 6); *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F. 2d 1195 (C.A. 5); *Powell* v. *Southwestern Bell Telephone Co.*, 494 F. 2d 485, rehearing denied, 498 F. 2d 1402 (C.A. 5). The holding in the present case recently has been approved in at least one district court decision (*Sutherland* v. *SKF Industries, Inc.*, 419 F. Supp. 610, 616 n. 4 (E.D. Pa.)), but it conflicts with the weight of district court authority (see cases cited at Pet. 13–14 n. 5).

The importance of the issue presented here stems in part from the fact that the ADEA is applicable to

all personnel actions of any employer, with 20 or more employees, in any industry affecting interstate commerce. The provisions of the Act also apply to recruiting, advertising and referrals by employment agencies serving covered employers and to specified actions by unions having 25 or more members and which represent or seek to represent the employees of such employers. 29 U.S.C. 623 and (Supp. V) 630. Increased familiarity with the provisions of the ADEA has resulted in a rapid increase in the number of age discrimination complaints that have been filed. Complaints filed with the Secretary of Labor in fiscal years 1973, 1974, 1975 and 1976 numbered, respectively, 2208, 3040, 4717 and 5824. United States Department of Labor, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1975*, p. 6 (1976) (*"Age Discrimination Report"*).

These figures provide some indication of the importance of preserving the availability of private enforcement actions to enforce the ADEA. To the extent that private enforcement actions are an effective alternative to suit by the Secretary, the Secretary is left free to devote the limited public resources that have been made available (see 29 U.S.C. (Supp. V) 634) to cases of significant precedential value and to those arising out of company-wide patterns and practices. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (relying upon similar considerations in the enforcement of the housing discrimination provisions of the Civil Rights Act of 1968).

Conversely, to the extent that private litigation is bedeviled by procedural complexities and pitfills, its significance as an alternative to suit by the Secretary is diminished.

The degree to which procedural problems have reduced the efficacy of private enforcement actions is reflected in the fact that through the end of 1975, more than one-half of all reported private actions under the ADEA had been dismissed by the district courts on procedural grounds. *Age Discrimination Report, supra,* p. 14. Almost one-third of all cases were dismissed at least in part because of failure to comply with the notice-to-sue provision of the ADEA. It is, therefore, essential to realization of the purposes of the ADEA that the present conflict on the question presented in this case be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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